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PP

v.

PAOSI ARONG & ANOR

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HIGH COURT MALAYA, ALOR SETAR
HO MOOI CHING JC
[CRIMINAL APPEAL NO: 45-19-2002]
30 SEPTEMBER 2009

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Drugs found in compartment in boot of car - Whether proved to have been specially constructed for that purpose - Whether there was physical evidence to link the accused with offending exhibits - Failure to call crucial witness - Evidence Act 1950, s. 114(g) -*

D

Whether invoked - Whether s. 37(d) and (h) Dangerous Drugs Act 1952 inapplicable to the facts of the case - Prima facie case against the accused persons - Whether established

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The respondents were acquitted and discharged of the charge of trafficking 55,266 grams of cannabis, an offence under s. 39B(1)(a) Dangerous Drugs Act 1952. The public prosecutor filed a notice of appeal against their acquittal. Briefly, the facts were that both the accused persons were in a black BMW 525i with Bangkok registration number when they were stopped at a routine police

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roadblock. SP5 and SP7, while opening the boot, had detected a strange smell and upon discovering an extra compartment for the speaker, prised open the compartment and found slabs wrapped in aluminium foil with an outer plastic wrapping which was confirmed to be cannabis. The issues that arose herein were (i) whether

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s. 37(d) and (h) were inapplicable to the facts of the case; (ii) whether the presumption of s. 114(g) of the Evidence Act 1950 could be invoked and (iii) whether prosecution had made out a *prima facie* case against both the accused persons.

Held (acquitting and discharging both the accused persons):

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(1) In order to prove that the compartment in the boot in which the drugs were concealed was one specially constructed for that purpose, the prosecution had called SP6, a diagnostic technician from BMW. In this case, the car bore a Thai registration

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number and PW6 could not say where it was marketed as he had no training except in respect of BMW cars sold in Malaysia. There was nothing in his training or experience that

qualified him to testify about BMW cars marketed in Thailand. The cars were sold in different countries with different specifications and this court could not accept his speculation that the compartment in question was not part of the original specifications. Similarly, SP5 and SP7 were also admittedly not experts in BMW cars and their evidence that the compartment in question was an addition could not be accepted as proof of the fact. Since the drugs were not found to have been concealed in a specially constructed compartment, they could not be deemed to have been concealed with the knowledge of the person in charge of it. The mere fact that both the accused persons were together in the car was insufficient evidence on which to make a *prima facie* case finding of common intention of trafficking the offending drugs in this case. Further, there was no physical evidence to link the accused with the offending exhibits. (paras 10, 12, 13 & 14)

(2) Both the accused persons were not owners of the car. The car owner was one Mad Naruding, whose address was stated in the insurance cover recovered from the car. He was a witness essential to the unfolding of the narrative on which the prosecution case was based. Yet, the police did not put too much effort to locate the witness or to offer any reasons for failing to secure his attendance. Mad Naruding was a crucial witness who could have testified not only as to the compartment in the boot and the length of time the accused persons were in possession of his car, but also the presence of the offending drugs and whether both the accused had the opportunity of concealing the drugs in the boot. There was a gap in the narrative of the prosecution's case due to the failure to call Mad Naruding. Mad Naruding was not a fictitious character and the prosecution's failure to call him had resulted in their failure to prove that the accused had exclusive control and custody of the drugs in question (*PP v. Nordin Awang*). The circumstances of the instant case justified invoking the presumption in s. 114(g) of the Evidence Act 1950. (paras 15, 16 & 17)

(3) The slabs of cannabis were concealed in such a manner that the court could not find that the accused had known of their existence. This was especially so in view of the inconsistent evidence as to the smell of cannabis. The prosecution's difficulty was compounded by the fact that the car was stopped

A by chance at a routine roadblock and there was no evidence of any observation prior to that or the duration of time that both accused had been in the car. Further, although in his report (exh. P18) SP5 said that the accused had behaved in a suspicious manner, he could not say how their behaviour gave
B rise to suspicion. On the contrary, he admitted that they were cooperative and did what they were directed to do. They did not attempt to make a run for it at any time after their car was stopped. (para 18)

C **(4)** The presumptions in s. 37(d) and (h) of the DDA were inapplicable herein. In the circumstances, the prosecution had failed to make out a *prima facie* case against both the accused on the charge and it was entirely unsafe to call for the defence. Both accused were found not guilty. (para 19)

D **Case(s) referred to:**
Adel Muhammed el Dabbah v. A-G (Palestine) [1994] AC 156 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
PP v. Letchumanan Suppiah [2006] 1 CLJ 557 CA ***(dist)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
E *PP v. Muhamad Sulaiman [1982] CLJ 540; [1982] CLJ (Rep) 292 FC* ***(refd)***
PP v. Nordin Awang [2000] 1 LNS 288 HC ***(refd)***
PP v. Saare Hama & Anor [2001] 4 CLJ 475 HC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

F **Legislation referred to:**
Dangerous Drugs Act 1952, s. 37(d), (h)
Evidence Act 1950, s. 114(g)

For the prosecutor - Ahmad Zakhi Mohd Daud DPP
For the accused 1 & 2 - Jagdeep Singh Deo; M/s Karpal Singh & Co
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Reported by Suhainah Wahiduddin

JUDGMENT

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Ho Mooi Ching JC:

[1] On 26 July 2009, both respondents (referred to hereinafter as the 'accused') were acquitted and discharged of the following
I charge, without their defence being called:

> Bahawa kamu bersama-sama pada 30.4.2001, lebih kurang jam 8.15 malam, di sekatan jalanraya Km 3.1 Lebuhraya Bukit Kayu Hitam-Alor Setar, di dalam daerah Kubang Pasu, di dalam negeri

> Kedah Darul Aman, telah didapati memperedarkan dadah berbahaya iaitu cannabis seberat 55,266 g, suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama dan dibaca bersama s 34 Kanun Keseksaan.

The public prosecutor filed a notice of appeal against their acquittal on 11 August 2009 but this notice was only brought to my attention on 13 September 2009. I will now set out the grounds of my decision.

[2] At the close of the prosecution case, it was incumbent on the prosecution to prove a *prima facie* case. Both sides referred to the case of *Balachandran v. PP* [2005] 1 CLJ 85 at 99, where the Federal Court held that:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

It is not disputed that maximum evaluation of the evidence is called for at this stage.

[3] Hearing of this case commenced on 17.3.03 when YA Dato' Abdul Kadir bin Musa heard both photographers (SP1 and SP2) and the exhibit storekeeper (SP3) (see pp. 1-14 of the notes). Hearing was continued on 27 July 2004 by YA Dato' Wan Adnan bin Muhamad who heard the chemist SP4 (Pn Eliza binti Mat Nor), who ultimately had to be recalled before me in 2009 when it was discovered that the voluminous exhibits produced had not been individually marked. YA Dato' Zainal Adzam bin Abd Ghani took over the hearing on 12 April 2007 and heard the examination-in-chief of SP5, Kpl Mohd Yusof bin Taib. From 5 March 2009, I heard the evidence of Ho Yong Yi (SP6), the diagnostic technician from BMW, Kpl Mohd Ali bin Tasrif (SP7), the chemist SP4, the cross-examination and re-examination of SP5 and the Investigating Officer CI Zakri (SP8).

[4] There was evidence from SP5 and SP7 that at the material time and place in question, a black BMW 525i with registration number 1A 7153 Bangkok ('the BMW car') that was driven by accused 1 with accused two as his passenger, was stopped at a routine police roadblock. SP5's version is that he asked for their travel documents and found them to be valid. SP7 directed the

driver to open the boot for examination and both the accused alighted from the car. Accused 1 used his key to open the car boot. After the boot was opened, SP7 told SP5 that there was a strange smell, which SP5 himself did not detect. They saw that there was what they said was an extra compartment for the speaker in the boot behind the rear seat. According to SP5, SP7 then entered the car and examined its interior. When SP7 emerged from the car, SP7 told him there was something in the boot of the car. Both of them tried to prise open the compartment in the boot and SP7 finally succeeded in doing so. In the compartment, they found slabs wrapped in aluminium foil with an outer plastic wrapping which they suspected contained cannabis.

[5] SP7's version is that after the car was stopped at the roadblock, he, SP5 and L/Kpl. Abu Hassan examined the car. SP5 then asked both driver and passenger to alight from the car and SP7 proceeded to examine the interior of the car. When he did so in the presence of both the accused, he smelt a strange smell that he suspected to be that of cannabis. He could identify the smell as he had previously participated in the seizure of a substantial amount of cannabis. He examined the rear seat and after he pulled down the armrest in the middle of the rear seat, he discovered a hole behind the armrest, the size of a 50-sen coin. He felt something with a spongy consistency behind the hole. Using a torch light, he saw the reflection of something shining through the hole. He continued to smell the strange smell and suspected the presence of cannabis in the boot. He told SP5 of his suspicions. He and SP5 then proceeded to examine the boot of the car and found a special compartment behind the rear seat that appeared as if it had been partitioned off to house a speaker. After some effort, he and SP7 managed to prise off the decorated panel seen in photograph P6C and discovered the slabs mentioned by SP5.

[6] There were significant differences in the versions of SP5 and SP7, principally with regard to the sequence of events. Going by SP5's version, it was SP7 who had ordered both the accused out of the car while SP7 said it was SP5 who did so. SP5 said SP7 had examined the boot of the car first, told him of the strange smell and then went on to search the interior of the car. However, going by SP7's version, he had examined the interior of the car, detected what he identified as the smell of cannabis and then went on to examine the boot. This was materially different from SP5's version as SP5 made no mention of the fact that SP7 detected the smell

on searching the interior of the car but only after opening the boot of the car. This is significant as if the smell had been discernable inside the cabin of the car, the accused may also have smelt it. However, even if that were so there is no evidence that they would have been able to identify the smell. Even more significant is the fact that SP5 admitted that he could not detect any smell which makes it equally probable that the accused may not have detected it either. SP7 himself admitted that the smell was not as strong as it was in court when the exhibits were opened.

[7] After the discovery of the slabs, L/Kpl. Hasan drove the car back to the base of the Anti-Smuggling Unit with both the accused guarded by SP5 and SP7 in the back seat. There, on the direction of ASP Jamaluddin, SP5 contacted Insp Zukri (SP8), the investigating officer ('IO') from the Narcotics Division of IPD, Kubang Pasu. On his arrival at 9.15pm the same night, SP8 ordered SP5 and SP7 to do a thorough search of the car in the presence of both accused. The search yielded 56 slabs each wrapped in aluminium foil with a clear plastic outer wrapping which were all seized. These were individually marked by SP5, then handed over to SP8 together with other seized items including the car, some personal effects of the accused and documents recovered from the car. Search lists were prepared and served on both accused. SP5 also prepared and signed P17, listing out the exhibits handed over to the IO who also signed to acknowledge receipt.

[8] On receipt of the exhibits, SP8 packed the 56 slabs into two boxes and brought them to IPD Kubang Pasu in the seized car in his custody. After marking them and having had photographs taken of them, he had safe custody of them until 2.05pm on 2 May 2001, when he handed them over to the chemist SP4, who analysed the 56 slabs of plant material and found them to contain 55,266 g of cannabis.

[9] Section 37 of the Dangerous Drugs Act 1952 ('DDA') provides that:

> In all proceedings under this Act or any regulation made thereunder: ...
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

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(h) if any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved be deemed to have been so concealed with the knowledge of the owner of the vehicle and
B of the person in charge of the vehicle for the time being; …

[10] In order to prove that the compartment in the boot in which the drugs were concealed was one specially constructed for that purpose, the prosecution called Ho Yong Yi ('SP6'), a diagnostic
C technician from BMW, Alor Setar. He testified that that he had worked with that company since 2006 and had received training one week in every month of service with regard to technical skills, specifications and features of BMW vehicles. On 7 April 2008, he went to the PDRM vehicle store where he was shown the BMW
D car. On examining the boot, he found a compartment shown in photograph P6D which he said was a modification of the original specifications. According to him, the said compartment was not part of the original specifications and there was only a flat space for the storage of the spare tyre where the compartment was. On cross-
E examination, he admitted he did not know if the car was constructed in Thailand and agreed he had received no training outside Malaysia. He also admitted that the specifications of BMW cars differed from country to country and agreed he was not qualified to testify about BMW cars not marketed in Malaysia.
F Under re-examination, he said that the only differences between cars marketed in countries like Singapore and Thailand compared with those sold in Malaysia, lay in the sports rim, power steering and leather seats. Then he volunteered that if given the chassis number, he could key in the information into the computer system and
G obtain the original specifications of the car. Despite this, no effort was made by the prosecution to procure this information.

[11] On this issue, the case of *PP v. Saare Hama & Anor* [2001] 4 CLJ 475 is on all fours with this case. In that case, the offending
H drugs were found in a car driven by one of the accused with the other accused as passenger. The car was stopped in a police ambush and both accused ordered to alight. With the aid of a T-shaped screw-driver, one of the police officers took out two screws behind the passenger seat, separated a partition and found hidden between
I the back seat and the audio set, some compressed blocks of plant material later analysed and found to be cannabis. At the end of the prosecution case, Vincent Ng J (as he then was) held that the

expression 'compartment, specially constructed for the purpose' used in s. 37(h) of the DDA means a compartment specially constructed and designed for the special purpose of concealment of offending drugs. To establish that the compartment was specially designed for that purpose, it was held that the prosecution would have to adduce evidence from an expert or a person who was entirely familiar with the car and model of the same make as the subject car sold in the country concerned. In that case, the court held that the competency of PW7, the technical assistant in Kah Motor Sdn Bhd, was in serious doubt as he had admitted he was familiar with the components and compartments of Honda Accord cars sold in Malaysia and he did not know the standard internal structure or configuration of the car in question in that case as it was of Thai origin. The court found the presumption under s. 37(h) inapplicable and it could not be presumed that both the accused had knowledge that the drugs were so concealed.

[12] In this case, the car bore a Thai registration number and PW6 could not say where it was marketed. He had no training except in respect of BMW cars sold in Malaysia. I agree with the learned DPP's submission that an expert witness need not have academic training to be regarded as an expert and may be regarded as one by virtue of his education and practical experience (see *PP v. Muhamad Sulaiman* [1982] CLJ 540; [1982] CLJ (Rep) 292). SP6's evidence was clearly admissible but there was nothing in his training or experience that qualified him to testify about BMW cars marketed in Thailand. He could not say where the car was marketed and admitted he was not qualified to testify about cars not marketed locally. The cars were sold in different countries with different specifications and I could not accept his speculation that the compartment in question was not part of the original specifications. Similarly, SP5 and SP7 were also admittedly not experts in BMW cars and their evidence that the compartment in question was an addition could not be accepted as proof of the fact. That being the case, I found the presumption in s. 37(h) of the DDA inapplicable to the facts of the case.

[13] As I could not find that the drugs were concealed in a specially constructed compartment, they cannot be deemed to have been concealed with the knowledge of the person in charge of it. Indeed, even if the presumption in s. 37(h) were found to apply, the question would also arise as to whether it was the driver, the passenger or both who were in charge of the car. Although common

A intention is an ingredient of the charge, the mere fact that both of them were together in the car, without more, is insufficient evidence on which to make a *prima facie* finding of common intention of trafficking the offending drugs in this case. In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, the B Supreme Court held that a vehicle in which a drug is carried does not *ipso facto* fall within the words 'anything whatsoever containing any dangerous drug' and therefore in such a case, the presumption contained in s. 37(d) of the DDA did not arise. The prosecution then had to rely on circumstantial evidence to prove that the C accused had in their custody or under their control the offending drugs. In this case, there was a driver and a passenger in the car, both of whom were not the owners of the car. As observed by the court in *Lin Lian Chen*'s case, the onus on the prosecution is a heavy one and the evidence must point irresistibly to the guilt of D the accused.

[14] The investigating officer, CI Zukri (SP8) testified that when he arrived at the UPP office where the car had been brought, he directed SP5 and his men to conduct a 100% search of the car E using gloves so as not to contaminate the evidence. Apart from directing photographs to be taken of the car before the search was conducted, he also directed the photographer to lift fingerprints off the 56 slabs of drugs but the results were negative. He also had nail clippings taken from both accused but on analysis, all samples were F found to be negative for cannabis. There was therefore no physical evidence to link the accused with the offending exhibits. SP8 further testified that the car owner was one Mad Naruding and he had contacted the Unit Nukleus Narkotik to obtain a statement from him but had received no response. He also called one CI Low G from that unit but was told that Mad Naruding refused to cooperate. CI Low was not called to testify as to the efforts made to secure the attendance of Mad Naruding. Further, SP8 said that before he was transferred from his post, he asked his successor CI Cheng to get Mad Naruding's cooperation. CI Cheng was not called H to explain the steps he had taken for that purpose.

[15] In *Saare Hama*'s case *(supra)*, the car owner, a Mr Maroning was also not called but the results of inquiries carried out as stated in letters from the Thai officers showed that he was wanted by the I Thai authorities to assist them in investigations relating to drug offences. The investigating officer took no further action to trace Mr Maroning although his address in Thailand was known. The

learned judge (following *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1) found that Mr Maroning was a witness essential to the unfolding of the narrative and it was regrettable that he had not been called. Similarly, in this case, Mad Naroding whose address is stated in the insurance cover note D28 recovered from the car, was a witness essential to the unfolding of the narrative on which the prosecution case was based. Yet, the police did considerably less than they did in *Saare Hama*'s case to locate the witness or to offer any reasons for failing to secure his attendance. In *Saare Hama*'s case, the fact that the Thai police had apparently been unsuccessful in locating him afforded some explanation as to why the prosecution were unable to produce him. In the instant case, there was only vague evidence that Mad Naruding had 'refused to cooperate'.

[16] In *Ti Chuee Hiang*'s case, the Federal Court held it to be 'clear law, that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see eg, *Adel Muhammed el Dabbah v. A-G (Palestine)* [1994] AC 156 at 167-9) the most basic limitation upon prosecutorial discretion in the presentation of a case, is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less that a statutory duty - the accused must be acquitted'. In this case, Mad Naruding was a crucial witness who could have testified not only as to the compartment in the boot and the length of time the accused were in possession of his car, but also the presence of the offending drugs and whether both accused had the opportunity of concealing the drugs in the boot. In *Ti Chuee Hiang*'s case, Edgar Joseph FCJ (as he then was) added that where it was never suggested by the prosecution that the witness was not capable of belief, it would not have sufficed for the prosecution to have merely made him available to the defence to be called as defence witnesses as such a course would have put the defence to the disadvantage of not having been able to cross-examine them on any point on which they might support the prosecution case. Following that case, I find that there is a gap in the narrative of the prosecution case due to the failure to call Mad Naruding, offer him to the defence or supply good reason for failing to procure his attendance.

[17] Mad Naruding is not a fictitious character and the prosecution's failure to call him has resulted in their failure to prove that the accused had exclusive control and custody of the drugs in question (see *PP v. Nordin Awang* [2000] 1 LNS 288). The circumstances of the instant case justify invoking the presumption in s. 114(g) of the Evidence Act. As there is no satisfactory evidence that the evidence of Mad Naruding could not be produced, it must be presumed that his evidence, if produced, would be unfavourable to the prosecution.

[18] I am mindful of the fact that the issue of ownership of the vehicle is not an essential fact to be proved in every case. The learned DPP had submitted the case of *PP v. Letchumanan Suppiah* [2006] 1 CLJ 557 to support his submission that it was not essential to call the car owner. In my view, that case can easily be distinguished from the instant case on the facts. In that case, the orange plastic packet containing the offending drugs was found in the carrier basket of the motorcycle right in front of the accused placed between the handle of the vehicle and between his legs when he was riding it. The packet was seen by the police witness from a distance of 6 to 7 feet away when he was observing the accused and it was therefore, not open to the accused to say that he had not known of its existence. The Court of Appeal found that the issue of ownership was irrelevant, the issue being that of control or custody of the orange plastic packet and without calling the owner of the motorcycle the prosecution had discharged the burden of establishing possession with knowledge with the aid of the presumption in s. 37(d) of the DDA. In this case, the slabs of cannabis were concealed in such a manner that the court could not find that the accused had known of their existence. This is especially so in view of the inconsistent evidence as to the smell of cannabis as indicated earlier in this judgment. The prosecution's difficulty was compounded by the fact that the car was stopped by chance at a routine roadblock and there was no evidence of any observation prior to that or the duration of time that both accused had been in the car. Further, although in his report (exh. P18), SP5 said that the accused behaved in a suspicious manner, he could not say how their behaviour gave rise to suspicion. On the contrary, he admitted that they were cooperative and did what they were directed to do. They did not attempt to make a run for it at any time after their car was stopped.

[19] To recapitulate, for the reasons stated above, I find that the presumptions in s. 37(d) and (h) of the DDA were inapplicable. The prosecution's failure to call the owner of the car had also left a crucial gap in its case that justified invoking the presumption under s. 114(g). In the circumstances, the prosecution had failed to make out a *prima facie* case against both the accused on the charge and it was entirely unsafe to call for the defence. Both accused were found not guilty and acquitted and discharged without their defence being called.

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